ILECs and competitive LECs ("CLECs") from implementing carrier freezes solely at the "account level," thereby automatically restricting all changes in a customer's choice of carriers.

(d) ILECs and CLECs should be required to allow three-way calls to remove a carrier choice freeze or to change a selected carrier when a freeze is already in place. Local carriers should provide adequate facilities and staffing to expeditiously process anticipated call volumes during normal business hours, and should be required to establish appropriate alternative methods (such as answering machines, Conversant systems or other electronic means) to process three-way calls in a timely manner after normal business hours.

(e) ILECs and CLECs should be prohibited from discussing their own competing services, or those of any affiliate, with customers during the processing of a three-way call to remove a carrier selection freeze or to change the subscriber's selected carrier when a freeze is already in place. The transaction should instead be limited to collecting the information necessary to remove the current frozen carrier choice and effectuate the customer's new carrier selection request.

(f) Local carriers should also be required to accept written requests from customers to remove a carrier selection freeze or to change their selected

carrier when a freeze is already in place, and should be required to accept copies supplied to customers by another carrier of any document used by the local carrier to change a carrier selection freeze.

(g) Where expressly authorized to do so by affected customers, carriers should also be permitted to submit customers' change orders directly to an ILEC or CLEC, and to remove the customers' existing freeze or to change the selected carrier for that service level when a freeze is already in place. The Commission should prescribe appropriate procedures (such as verification by an independent third party) to confirm the submitting carrier's authority to alter the customers' current frozen carrier selection.

(h) To assure that customers are properly informed that a carrier selection freeze has been implemented for their service, all local carriers should be required to confirm to the customer in writing when a freeze option has been applied to their telephone service, and to state (i) the specific service level(s) to which the freeze applies; (ii) the identity of the current carrier(s) to which the freeze option applies; and (iii) the methods by which the customer may remove the freeze or change that subscriber's selected carrier when a freeze has previously been implemented.

(i) Finally, to facilitate the accurate and timely implementation of customer' carrier selection changes and to avoid unnecessary confusion and cost, ILECs and CLECs should be required to furnish other carriers with data identifying those local subscribers who have elected a carrier selection freeze and the service level at which each such subscriber has frozen the carrier choice.[6] Moreover, to preclude use of those data for anticompetitive purposes, the Commission should prohibit local carriers from disclosing carrier selection freeze information to their own affiliated IXCs (except as to customers who have designated that IXC as their carrier), or from using such information for marketing their own services to other carriers' subscribers.

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[6] However, consistent with current industry practice, the identity of the specific carrier selected by the subscriber for each service level should not be disclosed by an ILEC/CLEC to any other carrier (or, for that matter, to any IXC affiliated with the ILEC/CLEC).

WHEREFORE, for the reasons stated above, the Commission should immediately institute a rulemaking to regulate LEC carrier selection "freeze" procedures in accordance with the foregoing Comments.

Respectfully submitted,

AT&T CORP.

By /s/ Peter H. Jacoby
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June 4, 1997

CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 4th day of June, 1997, a copy of the foregoing "AT&T Comments" was mailed by U.S. first class mail, postage prepaid, to the parties listed below.

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UNIMAT, INC.
v.
MCI TELECOMMUNICATIONS CORPORATION.
Civ. A. No. 92-5941.
United States District Court, E.D. Pennsylvania.
Dec. 16, 1992.

Lawrence E. Feldman, Needle and Feldman, Philadelphia, Pa., for plaintiff.
Mark S. Halpern, Furman & Halpern, P.C., Bala Cynwyd, Pa., for defendant.

MEMORANDUM AND ORDER

VANARTSDALEN, Senior District Judge.

I. FACTS

*1 On March 15, 1992, plaintiff Unimat, Inc. (Unimat) initiated this action in the Court of Common Pleas of Philadelphia County by filing a Writ of Summons, docketed as March Term, 1992, No. 1738. On September 15, 1992, Unimat served the complaint upon defendant MCI Telecommunications Corporation (MCI). In the five count complaint, Unimat asserts the following causes of action: (1) misrepresentation; (2) breach of express warranty; (3) breach of implied warranty; (4) negligence; and (5) breach of express and implied contract.

On October 13, 1992, MCI removed the case from state court to the United States District Court for the Eastern District of Pennsylvania. In its notice of removal, MCI alleged jurisdiction pursuant to 28 U.S.C. s 1331 (federal question), 28 U.S.C. 1337 (commerce and antitrust regulations), and 47 U.S.C. s 151 et seq. (the Federal Communications Act of 1934). [FN1]

"Hello Unimat ... How May I Help You?" "Oh, Excuse Me, I Must Have Dialed The Wrong Number" ... Click.

The relevant facts are largely undisputed. In 1989, MCI assigned a 1-800 telephone number to Unimat, a company primarily engaged in the direct marketing and mail order business. (Complaint P 1). So far as the pleadings inform, Unimat contacted MCI and told an MCI customer service representative that it was interested in an "euphonious and easy to remember" 1-800 telephone number (Complaint P 4). The MCI representative allegedly recommended 1-800-999-7878 (the 7878 number). Relying upon MCI's advice and recommendation, Unimat accepted the 7878 number. Unimat apparently published the 7878 in catalogs and other direct mail methods which were circulated nationally to Unimat's customer base. (Complaint PP 4, 8).

Much to Unimat's dismay, upon obtaining and activating the 7878 number, Unimat was constantly troubled by a vast amount of caller "hang ups." According to Unimat, many callers who had intended to dial 1-800-999-7879 often mis-dialed and instead called Unimat's number, 1-800-999-7878. Once the caller realized the mistake, the caller would hang up the telephone. This "hang up" activity allegedly caused Unimat to suffer damages including "constant interruptions to its telephone sales business, complaints by its own staff and wrong number billings which MCI has refused to credit back to [Unimat's] account." (Complaint P 8). As a consequence, Unimat filed this lawsuit wherein its core contentions are that MCI was under a duty to disclose potential problems with assigning the 7878 number to Unimat; MCI breached this duty by failing to

disclose; and the breach caused Unimat to suffer damages. Specifically, there are three items which Unimat alleges MCI failed to disclose at or before the time of assignment: (1) MCI knew that a similar telephone number (1-800-999-7879), which differed from the 7878 number by only one digit, received a very large volume of calls because it was (and apparently still is) utilized by thousands of subscribers of a voice mail service company (Complaint P 5); (2) MCI knew that callers who intended to dial the 7879 number frequently misdialed and instead called Unimat's number, 7878 (Complaint P 6); and (3) a prior user of the 7878 number had discontinued MCI's service because it had received a significant amount of callers who had dialed the wrong number (7878, instead of 7879) and then hung up (Complaint P 7).

*2 Presently before the court is MCI's motion to dismiss or, in the alternative, to stay the proceeding and refer certain issues to the Federal Communications Commission (FCC). [FN2] In brief, I conclude that issues within the primary jurisdiction of the Federal Communications Commission (FCC) should and will be referred to the FCC and that all further judicial proceedings in this action will be stayed pending the FCC's determination.

II. DISCUSSION

As explained by the Supreme Court of the United States, the doctrine of primary jurisdiction is

> a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574 (1952); See MCI Communications Corp. v. American Telephone & Tel. Co., 496 F.2d 214, 220 (1974); see generally Jaffe, Primary Jurisdiction, 77 Harv.L.Rev. 1037 (1964). It is a court developed doctrine "concerned with promoting proper relationships between the courts and administrative agencies charged with regulatory duties." Kaplan v. ITT-U.S. Transmission Systems, 831 F.2d 627, 630 (6th Cir.1987). It was designed to minimize potential conflicts between a court and an administrative agency which may arise because of "the court's lack of expertise with the subject matter of the agency's regulation or from contradictory rulings by the agency and the court." MCI Communications Corp., 496 F.2d at 220. Application of the primary jurisdiction doctrine requires a court to "transfer an issue that involves expert administrative discretion to the federal administrative agency charged with exercising that discretion for initial decision." Richman Bros. Records v. U.S. Sprint, 953 F.2d 1431, 1435 n. 3 (3d Cir.1991), cert. denied, 112 S.Ct. 3056 (1992); see Baltimore Bank for Cooperatives v. Farmers Cheese Cooperative, 583 F.2d 104, 108 (3d Cir.1978). Thus, courts refer to administrative agencies matters that involve technical and/or policy considerations that are "beyond the

court's ordinary competence and within the agency's particular field of expertise." MCI Communications, 496 F.2d at 220.

The Federal Communications Commission (FCC) is the administrative agency charged with expert skill and knowledge within the telecommunications industry. It was established by the Federal Communications Act of 1934, 47 U.S.C. s 151 et seq. (the Act) and pursuant thereto has a broad range of powers including regulation, investigation, adjudication, and enforcement. The Act, a "comprehensive scheme of federal law governing charges, practices, duties and liabilities of interstate telecommunication carriers," Lazar v. MCI Communications Corp., 598 F.Supp. 951, 954 (E.D.Mich.1984), governs the activities of common carriers. See Ivy Broadcasting Co. v. American Telephone & Tel. Co., 391 F.2d 486, 490 (2d Cir.1986). Under the Act, common carriers such as MCI must file tariffs with the FCC. [FN3] 47 U.S.C. s 203(a). Tariffs include a schedule of rates and classifications, regulations and practices which may affect the rates. Unreasonable and discriminatory tariffs are prohibited. Id. ss 201-02. By the express terms of section 201(b) of the Act, all rates and practices of a carrier must be just and reasonable. A plaintiff who has sustained damages as the result of conduct in violation of the Act may file a claim either before the FCC or in a federal district court. Id. s 207. But, the mere filing of a lawsuit in federal court will not deprive the FCC of its primary jurisdiction. Richman Bros., 953 F.2d at 1435.

***3** Issues that call into question the reasonableness of a carrier's rate, charge, or practice pursuant to section 201(b) of the Act (201(b) issue) are within the FCC's primary jurisdiction. See Kaplan, 831 F.2d at 631. When confronted with a 201(b) issue, the court should refer it to the FCC, even if the court otherwise has proper jurisdiction. See Richman Bros, 953 F.2d at 1435 n. 3. As succinctly stated by the Kaplan court, "Congress has placed squarely in the hands of the [FCC]" authority to determine reasonableness of a carrier's rates, charges, and practices. Kaplan, 831 F.2d at 631; see also Consolidated Rail Corp. v. National Ass'n of Recycling Industries, Inc., 449 U.S. 609, 612 (1981).

Although Unimat fails to directly allege a violation of section 201(b) of the Act, it is clear that at the heart of Unimat's complaint lies 201(b) issues that challenge the reasonableness of MCI practices in assigning 1-800 telephone numbers to customers. [FN4] Complete resolution of this action demands an in-depth analysis into MCI's tariff and practices concerning the assignment of 1-800 telephone numbers to its customers, including the following inquiries: (1) Before assigning a telephone number, is MCI subject to a duty to disclose the telephone number's prior problematic history to the customer and, if so, what is the scope of that duty? (2) May MCI assign a telephone number, such as 1-800-999-7878, sequentially next to a telephone number, such as 1-800-999-7879, when MCI knows that the latter number traditionally has received a very large volume of calls and many mis-dialed numbers as to the final digit? Undoubtedly, these questions involve section 201(b) of the Act and the reasonableness of MCI's practices with respect to assigning 1-800 telephone numbers. As a consequence, the doctrine of primary jurisdiction should be applied. The 201(b) issues regarding the reasonableness of MCI's practices, as set forth above and in the following order, will be referred to the FCC. Meanwhile, all further judicial proceedings will be stayed pending the FCC's

determination. [FN5]

CONCLUSION

In the interest of justice and effort to preserve the goals and objectives of the FCC, the Act, and the primary jurisdiction doctrine, the issues presented in this case which concern the reasonableness of MCI's practices, as set forth above, will be referred to the FCC. All further judicial proceedings will be stayed pending the FCC's determination of these issues.

ORDER

In accord with the attached memorandum and upon consideration of defendant MCI Telecommunications Corporation's (MCI) motion to dismiss or in the alternative to refer certain issues to the Federal Communications Commission (FCC) and stay the proceedings, it is hereby

ORDERED that defendant MCI's motion to dismiss Civil Action No. 92-5941 is DENIED.

It is further ORDERED that MCI's alternative motion to refer the following issues to the FCC and to stay all judicial proceedings pending the FCC's determination of the issues is GRANTED in FAVOR of defendant MCI and AGAINST plaintiff Unimat, Inc.:

*4 (1) Before assigning a telephone number, is a long distance carrier such as MCI subject to a duty to disclose the telephone number's prior problematic history to the customer and, if so, what is the scope of that duty?;

(2) May a long distance carrier such as MCI assign a telephone number, such as 1-800-999-7878, sequentially next to a telephone number, such as 1-800-999-7879, when the carrier knows that the latter number traditionally has received a very large number of calls and many mis-dialed numbers as to the final digit?;

(3) Is MCI's tariff and practices concerning the assignment of 1-800 telephone numbers to its customers reasonable and in conformity with the Federal Communications Act and the rules and regulations of the Federal Communication Commission?;

(4) Such other issues as the Federal Communications Commission deems appropriate to carry out its duties and the purposes of this order.

It is further ORDERED that the Clerk of the Court shall prepare and send to the Managing Director of the Federal Communications Commission a copy of the accompanying memorandum, this order, and all pleadings filed. The Federal Communications Commission shall conduct and hold such hearings and procedures in accordance with the Federal Communications Act and the regulations and procedures of the Federal Communications Commission as it deems appropriate to determine the issues.

It is further ORDERED that Civil Action No. 92-5941 pending in this court is stayed and placed on the Civil Suspense Docket pending further order of this court.

This order shall not preclude the parties from filing any motion, pleading, application or other matter with the Federal Communications Commission.

FN1. MCI also alleges that this court has jurisdiction pursuant to 28 U.S.C. 1332(a)(1) (diversity of citizenship). MCI is alleged to be incorporated under the laws of the State of Delaware with its principal place of business in Washington, D.C. (Notice of Removal P 2). Unimat is alleged to be a Pennsylvania corporation with its "usual" place of busine

in Pennsylvania. (Complaint P 1; Notice of Removal P 3). Apparently, MCI intends Unimat's "usual" place of business to be an allegation of Unimat's principal place of business to be an allegation of Unimat's principal place of business for purposes of satisfying requirements of 28 U.S.C. s 1332(a)(1).

FN2. Plaintiff has filed no motion to remand nor any challenge to the removal or federal court jurisdiction.

FN3. MCI alleges that "MCI Tariff FCC No. 1" is the filed tariff applicable to its long distance services and applicable to the present facts. Unimat properly informs the court that the Tariff has not been attached to any MCI pleading, and to date, the Tariff is not a part of the record.

FN4. A plaintiff's failure to directly allege a violation of section 201(b) of the Act will not prevent the application of the primary jurisdiction doctrine. If plaintiffs were able to avoid application of the primary jurisdiction doctrine simply by artfully drafted pleadings, they could effectively render inoperative the doctrine, and the uniformity and consistency purposes of the FCC and the Act. see Lazar, 598 F.Supp. at 953-54.

FN5. In its memorandum, MCI also argued that Unimat's state common law claims are preempted by federal law. It appears that federal law (the Act and Federal common law) preempts state common law and statutory claims which require a determination of the reasonableness of a rate and practice of a carrier subject to section 201(b) of the Act. Issues regarding the duties, rates, practices, and liabilities of carriers are governed solely by federal law. "[S]tates are precluded from acting in this area," Ivy Broadcasting, 391 F.2d at 491 (emphasis added), and courts are to apply a uniform rule of federal common law "[w]here neither the [ ] Act itself nor the tariffs filed pursuant to the Act deals with a particular question." Id. On the other hand, it also appears that state claims within the conventional wisdom of the judge not requiring agency expertise and not based on section 201(b) of the Act are not preempted. Kaplan, 831 F.2d at 633. Considering the facts in this case and my decision to apply the doctrine of primary jurisdiction, MCI's motion to dismiss on preemption grounds will be denied.

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